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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 115

TENNESSEE BURLEY TOBACCO GROWERS' ASSOCIATION, *et al., Petitioners,*

v.

IVAN RANGE, *et als.*

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

PETITIONERS' REPLY MEMORANDUM

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The briefs in opposition filed pursuant to the Court's order of June 3, 1957 (353 U.S. 981) require a few words in reply.

I.

Respondents show (Br. Op. 1, 5) that contracts similar to the ones in question here have been executed by CCC in respect of Burley tobacco in four other states—Kentucky, North Carolina, Virginia, and West

Virginia. The Government agrees (U.S. Br. 4) with petitioners (Pet. 9) that the construction of those contracts involves a question of federal law. Very plainly, the meaning of the contracts cannot be permitted to vary as the courts of five separate states happen to construe their terms, perhaps (as here) by an intermediate appellate court without any authoritative expression by the state court of last resort (Pet. App. A41-A42). Yet such a result is more than a mere possibility in the absence of review by this Court.

II

That being so, the issue in the present case is not disposed of by the Solicitor General's approval of the holding of the Tennessee Court of Appeals (U.S. Br. 4 *et seq.*), particularly since the Government's brief herein gives a wholly misleading impression of the administrative practice and construction of the crucial provision in question here.

A. The present record contains impressive testimony by CCC officials that the distribution of net gains by the assignment of equities, the very action taken by these petitioners, was within the administrative construction given the word "distribute", and that accordingly no formal ruling was necessary to authorize what petitioners did and what the court below (and now the Solicitor General) say they should not have done.

Karl D. Loos, Esq., Solicitor of the Department of Agriculture and General Counsel of CCC from January 1953 to March 1954 (Tr. 2554-2558), testified in this case less than two weeks after he returned to private life.

(i) Here is his definition of the term "distribute", the critical word in the present case (Tr. 2560):

> "Distribution, the term distribution as a verb distribute, has been used in connection with the net margins or net income, as some people like to call it of a cooperative has signified the passing out to members or non-member patrons of their respective shares in that margin by means of cash or some other form of certificate or some other manner that gives the patron or member information regarding the amount of his share in that margin, and those certificates are such as revolving fund certificates, sometimes of capital stock, sometimes called certificates of equity, or even certificates of indebtedness are sometimes used for that purpose, revolving fund certificates and allocations are frequently made in a more or less formal or informal manner, and letters of advice are frequently referred to in that connection.
>
> "Q. Do all of the methods which you have just described constitute distribution to patrons?
>
> "A. They are so regarded as constituting distribution and their distribution is the same for purposes of taxation and cooperative accounting whether the distribution is in cash or in some non-cash form."

(ii) Mr. Loos also testified in this case that no specific authorization was necessary for the distribution of equities (Tr. 2649-2650):

> "Q. Now, this morning you were asked on cross examination if you gave any authority or anybody else gave any authority to the Tennessee Burley Growers Association to distribute its equities or net gains as was done by the Association in the '47, '48, and '49 crops, that is, by allocation upon notice to the patrons, or was there any necessity for getting any authority for pursuing such course?

"A. Certainly there was no necessity for getting any authority from me. I think the question is limited to whether I had given anybody any authority.

"Q. Well, in your interpretation was that in such compliance with the contract that no different arrangement or permission was required?

"A. That was my view, that the requirement of the contract that that gain be distributed had been complied with."

B. The Government's failure to advise this Court of the settled administrative construction of contracts such as this one by the Department of Agriculture is further underscored by sworn testimony in a related case[1] by a former President of CCC who was later an Assistant Secretary of Agriculture.

This individual was Dr. John H. Davis, who for eight years prior to his Government service had been Executive Secretary of the National Council of Farmers Cooperatives; he was president of CCC from January 1953 to January 1954; a Director of CCC from January 1953 to August 1954; and Assistant Secretary of Agriculture from June to August 1954. (Ramsey Tr. 3-4, 47-48.)

(i) Dr. Davis testified that, from 1946 on, the Department of Agriculture consistently interpreted the word "distribute" as did the petitioners here (Ramsey Tr. 31-33):

"* * * from 1946 on, at the top level in the Department, I think that there has been a consistent

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[1] *J. P. Ramsey et al* v. *Tennessee Burley Tobacco Growers Association et al.*, No. 1100, U.S.D.C., E.D. Tenn., N.E. Div., hereinafter referred to as "Ramsey Tr." We have lodged a copy of the transcript with the Clerk for the information of the Court.

acceptance of this principle of applying the Internal Revenue interpretation[2] to the word 'distribution'.

"Q. To get that specifically into the record, Mr. Davis, do you mean that there has been a consistent determination that the word 'distribution' as used in this contract did not necessarily mean distribution in cash?

"A. That is right.

* * * *

"Q. What was the determination at the top level in the Department of Agriculture through those years that you have mentioned, and while you were there presiding as president of the Commodity Credit Corporation, as to the meaning of the word 'distribution' in this contract?

"A. Well, the intent was to—well, I can speak most specifically about the time when I was there, but I did have discussion with both Brannan and Anderson on this point, and my belief is that all through that period there was a consistent desire to apply here the interpretation to the word 'distribution' which was developed and is applied by the Bureau of Internal Revenue, which is that distribution can be in cash or evidenced by certificates, or even in remuneration in kind.

"The Bureau of Internal Revenue says you can pay a person in kind, the association can, in goods, any kind of compensation, and the general procedure is to prorate that among the members on the basis of patronage.

"Q. Was what you have just stated the interpretation and the position of Commodity Credit Corporation during the time that you served as its president, from January 21, 1953 for a period of approximately eighteen months thereafter?

"A. I wasn't president of Commodity Credit for all that time. I was president of Commodity

[2] See Pet. 10-11.

Credit for about a year. But I was on the board all the time.

"Yes, that was the policy, I would say.

"Q. That was during the year when the allocations of the Tennessee Burley Tobacco Growers Association were made for the '47, '48 and '49 crops of Burley tobacco.

"A. Yes."

(ii) On cross-examination, Dr. Davis made it clear that the foregoing administrative construction of the term "distribution" made it unnecessary for the present petitioners to obtain authority from CCC as a prerequisite to distributing net gains by an assignment of equities (Ramsey Tr. 71-73):

"Q. Did you authorize Mr. Duncan[3] or the directors of the association[4] to take that money and use it in any way they wanted to or, as expressed in one deposition, to build a cheese factory on the moon if the directors saw fit? Did you give that authority or undertake to do so?

"A. Well, I would say that my action was no action. I did not refrain [restrain?] them from using the money.

"Q. I see.

"A. Because I believed that they had the right under the provision of the contract with Commodity Credit to use the money as long as they were allocating these certificates pro rata to the members and as long as the full obligation to Commodity Credit had been met.

"So, to answer your question, it would be no, I did not authorize them to do so because I didn't feel that any authorization was required, and if I made that statement about building a cheese plant

[3] The individual petitioner here.

[4] Tennessee Burley Tobacco Growers Association, the corporate petitioner here.

on the moon—I really don't remember it but I may have—I would have been merely speaking figuratively that the money was theirs as long as they used it following the procedures that cooperatives generally use, and that is what they were proposing to do.

"Q. Those discussions, Mr. Davis, in justice to you, were merely discussions of a problem and you weren't undertaking to commit Commodity to any authority or them to do anything?

"A. I was taking no official action for Commodity Credit in the way of formal authorization or any kind of authorization because my own belief was that no authorization was necessary.

"Q. That is your own opinion?

"A. That is right.

"I might say that there was some discussion of it with the Solicitor and with other members of the Commodity Credit Board * * * I am sure it's accurate to say that the majority opinion of the Commodity Credit Board would sustain this view as the board was constituted at that time.

* * *

"Q. That is merely your—

"A. That is my opinion.

"Q. Surmise and not an actual fact?

"A. I am not sure whether the minutes of any meetings would formally confirm that or not, but the point I am making is that there were discussions of it. I did not express this entirely without any conference or collaboration with other people, and I particularly relied on the Office of the Solicitor.

"Q. That is Mr. Loos you are speaking of?

"A. That is right. In fact, he was present at these meetings, generally speaking, I think probably at all of them."

In view of the foregoing authoritative evidence of the actual administrative construction of the present

contracts in the Department of Agriculture, it is obvious that the considerations now put forward by the Solicitor General (U.S. Br. 4-9) reflect, not any settled administrative practice, but only a reconsidered view, formulated *post motam litem*.

III

It is suggested (U.S. Br. 6) that CCC's regulations for the 1957 tobacco loan program (Sec. 464.906(b), 22 Fed. Reg. 4777, 4778) differ from those in the past, and that these will "materially detract from the importance of the question presented by the petition, since it will relate only to profits earned on tobacco crops of previous years."

But that suggestion ignores the realities of tobacco marketing. In the present case, the contracts involved covered the years 1946 to 1949, but the crops in question were not finally marketed until 1952. Such a long carry-over is normal in the trade. Therefore, even though the 1957 regulations are different from those of past years, their effect cannot be felt until 1960; the 1958 regulations may well revert to the earlier pattern; and meanwhile a ruling in the present case will affect thousands of tobacco growers in respect of crops from 1950 through 1956, and in respect of sales of such crops through the end of 1960 or even much later.

IV

For the foregoing additional reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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